Filed 6/30/16 In re J.M. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re J.M., a Person Coming Under the Juvenile Court Law.	B264532 (Los Angeles County Super. Ct. No. DK08675)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent. v. SHANNON M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Carlos E. Vasquez, Judge. Affirmed in part and reversed in part.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Shannon M. (mother) appeals from the dependency court's jurisdictional and dispositional order regarding her minor son, J.M. The court assumed jurisdiction after finding that mother failed to protect J.M. from the sexual abuse he endured from her then live-in boyfriend, Michael P. (Michael). Mother contends that the jurisdictional and dispositional order removing J.M. from mother's physical custody and awarding sole physical custody to J.M.'s father, Christopher M. (father) was not supported by substantial evidence. We agree with mother as to the dispositional order and, accordingly reverse that part of the order.

BACKGROUND

A. Discovery of the abuse

Mother and father married in November 2004. Their son, J.M., was born in 2008. Mother and father separated in February 2011. According to mother, the separation and eventual divorce stemmed from her struggles with depression. Their divorce became final in February 2012. The family law order regarding their divorce provided for joint legal and physical custody of J.M., with physical custody being shared as "'mutually agreed between the parties.'" J.M.'s parents initially determined that mother would have custody during the week and father would have custody on the weekends. After mother moved from Apple Valley to Pasadena, mother and father agreed to reverse the arrangement—that is, during the school year J.M. would spend the week with father and the weekends with mother.

Mother began dating Michael in the summer of 2013. However, she waited six months before bringing J.M. into her relationship with Michael. In the spring of 2014, mother moved in with Michael and his grandmother. Because mother had a low sex drive, she made a "deal" with Michael, allowing him to view pornography over the internet, although she was unaware that he viewed child pornography.

On November 13, 2014, agents from the Federal Bureau of Investigation (FBI) executed a search warrant for the home where mother and Michael lived and where J.M. visited on the weekends. On Michael's computer, the FBI discovered "approximately 1,000 images of child pornography." Due to the volume of child pornography found on

the computer, and the risk that Michael might pose a threat to J.M., the Department of Children and Family Services (DCFS) opened an investigation.

On November 14, 2014, one day after the FBI searched and seized Michael's computer, a children's social worker from DCFS went to mother's home and interviewed both mother and J.M. When the social worker informed mother of the investigation, mother exhibited a "flat effect and did not express emotion." It did not appear to the social worker that mother had a "a true understanding" of the risks posed to J.M. Mother later explained that her reaction was based on shock and fear.

When the social worker interviewed J.M., he stated that "every time" he came to stay with his mother and Michael, Michael would put medicine on his bottom and on his genitals while mother was at work or sleeping.

At a forensic interview conducted on December 3, 2014, J.M., consistent with his prior interview, described being touched by Michael on his bottom and "nuts and balls" when he was going to sleep and when mother was at work. Mother "did not have much reaction and did not display any type of affect" when she learned of J.M.'s statements at the forensic interview. In fact, "mother did not appear too concern[ed] but rather continued to minimize the disclosure."

Although mother eventually ended her relationship with Michael, believing him to be "sick," she did not leave immediately upon learning of the child pornography and the abuse of her young son. She did, however, cease any contact between the two, and J.M was never with Michael after the FBI searched the home. Mother continued to see her son by visiting him at father's home or by getting a hotel room close to father's home so she could be near J.M.

Mother explained that she continued to live with Michael for several reasons: she did not have a readily available alternative place to live; she thought she could help Michael and did not want to give up on him; she also provided care for Michael's grandmother and did not want to abandon her; and the home she shared with Michael was much closer to her work and she did not want to risk losing her job.

On December 9, 2014, the social worker contacted mother in order to explain DCFS's safety concerns, noting in particular mother's continuing defense of Michael and her minimization of J.M.'s disclosures about Michael's abuse. Mother then gave her consent for the removal of J.M. from her care.

B. Welfare and Institutions Code section 300 petition[1]

On December 12, 2014, DCFS initiated juvenile dependency proceedings by filing a section 300 petition alleging that Michael had sexually abused J.M.. It was further alleged mother knew or reasonably should have known about the sexual abuse, and failed to protect the child by allowing Michael to reside in the home and have unlimited access to the child.

At the initial detention hearing on December 12, 2014, the court appointed counsel for mother, father, and J.M. respectively. The juvenile court released J.M. to father's custody and detained him from mother. Although the court restricted mother to monitored visits, it allowed father to act as monitor. Finally, the court prohibited Michael from having any contact with the child.

C. Jurisdictional/dispositional hearing and findings

In preparation for the February 18, 2015 jurisdiction/disposition hearing, DCFS prepared a report summarizing the results of its investigation. The social worker found J.M.'s description of the abuse was "consistent" through several interviews and "very consistent" with respect to the specifics of the abuse. According to J.M., Michael would use the pretext of treating a rash on J.M. to touch the child's genitals and buttocks; this abuse would occur "[e]very time," "every single" time J.M. would visit mother at the home she shared with Michael.

The social worker further found that in interviews with J.M.'s parents "father presented to be very protective by saying that he would not allow the mother to ever take the child out of Apple Valley [where father resided]. The mother however did not have

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

much reaction and did not display any type of affect. The mother did not appear to concern[ed] but rather continued to minimize the disclosures."

Finally, the social worker also found that J.M. "remains safe in the home of his father" and that the risk level to [J.M.] is low while in the father's care." Based on its findings, DCFS recommended, inter alia, that J.M. be declared a dependent of the court and removed from mother's physical custody, and that jurisdiction be retained but transferred to San Bernardino County, the county in which the father resides.

On February 18, 2015, the court continued the matter to April 14, 2015, so that DCFS's forensic interview of J.M. could be transcribed.

On April 14, 2015, the court held the jurisdiction/disposition hearing. Although J.M.'s counsel joined in mother's request to have the petition dismissed, the court denied the request and instead sustained the petition, finding that, while mother may not have known about the abuse, she should have known about it. The trial court expressed particular concern about three sets of facts: (1) mother made a "deal" with Michael allowing him to view pornographic websites and she left J.M. alone with Michael despite the fact that Michael was not related to J.M. and she had only known Michael for a relatively short period of time; (2) mother was initially dishonest, telling the social worker that she "never" left J.M. alone with Michael;[2] and (3) immediately following the discovery of pornography on Michael's computer and Michael's abuse of J.M., mother initially seemed more concerned about Michael than J.M.. As a result, the court found mother's statements that she was protective of her son to be lacking in credibility.

The court terminated the case and entered a family law order granting the parents joint legal custody, father sole physical custody, and mother unmonitored visits. Mother timely appealed.

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[2] The court misstated the facts when it found that mother was dishonest about telling the social worker that she never left J.M. alone with Michael. The record indicates that Michael's 90-year-old grandmother resided with Michael and mother, and was present on every occasion when mother was away. The court also erroneously stated that mother had only known Michael for six months, although she had been dating him for a year and a half at the time of the FBI investigation.

DISCUSSION

A. The jurisdictional order

1. Standard of review

We review the court's jurisdictional findings for substantial evidence. "'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations] '"[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]."'" (*In re I.J.* (2013) 56 Cal.4th 766, 773.) "'Substantial evidence is evidence that is "reasonable, credible, and of solid value"; such that a reasonable trier of fact could make such findings.'" (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140; see *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393–1394.) "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the findings or order." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.)

2. The evidence supports the juvenile court's jurisdictional order

Where, as here, a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, "a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction is supported by the evidence." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) Although the petition was based on

both subdivision (b) and subdivision (d) of section 300, subdivision (d) is the one that more closely describes the situation regarding J.M.. Accordingly, we will focus on that subdivision.[3]

We conclude the evidence supported the juvenile court's jurisdictional finding under section 300, subdivision (d). Under section 300, subdivision (d), a juvenile court may exercise jurisdiction over a child when the "child has been sexually abused, *or* there is a substantial risk that the child will be sexually abused . . . by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse." To support a jurisdictional finding, the sexual abuse does not have to be committed by the child's parent; rather it is sufficient to establish jurisdiction if the abuse has been carried out by a member of the child's household.[4] (See § 300, subd. (d).)

Subdivision (d) of section 300 does not require a showing in every case that a child faces a risk of harm (i.e., sexual abuse) at the time of the jurisdiction hearing. (See *In re Carlos T.* (2009) 174 Cal.App.4th 795, 803.) Rather, it is sufficient to show that the child has been sexually abused by a parent or a member of the household, or a parent failed to protect the child from sexual abuse when the parent reasonably should have known that the child was in danger of being abused. If there is substantial evidence that the child was actually abused, "there is no need to discuss whether there was sufficient evidence to support jurisdiction under the *alternative* 'substantial risk' of abuse prong of

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[3] It should also be noted that our Supreme Court is currently addressing the question of whether section 300, subdivision (b)(1) "authorize[s] dependency jurisdiction without a finding that parental fault or neglect is responsible for the failure or inability to supervise or protect the child." (*In re R.T.* (2015) 235 Cal.App.4th 795, review granted June 17, 2015, No. S226416, 349 P.3d 1067, 1067.)

[4] A "'member of the household'" is "any person continually or frequently found in the same household as the child." (Cal. Rules of Court, rule 5.502(22).)

subdivision (d)." (*Id*. at p. 804; *In re J.K*. (2009) 174 Cal.App.4th 1426, 1436 [showing past physical harm sufficient for jurisdiction].)

Here, there was substantial evidence that Michael abused J.M. J.M. credibly described a pattern of abuse extending over a period of time from Michael, mother's then current live-in boyfriend. The record indicates that mother had been living with Michael for at least six months before the FBI arrested Michael, and during that time J.M. stayed with them on approximately 10 separate occasions. Accordingly, to J.M., the abuse occurred "every" time he stayed with his mother and Michael. If the abuse occurred only once per visit, as opposed to once each day of the visit, then, at a minimum, J.M. was abused 10 different times by Michael.

Mother does not dispute that her son was abused. She contends, however, that there was no substantial evidence of a current risk of harm to J.M. at the time of the jurisdiction hearing because she had broken off her relationship with Michael and now lived with other family members. Mother's argument is beside the point. While section 300, subdivision (b) provides for jurisdiction when the child has been abused or neglected and there is a current risk of abuse,[5] there is no such provision in section 300, subdivision (d). Subdivision (d), in other words, does not limit the duration of dependency to the time frame when the child remains at risk of sexual abuse. (*In re Carlos T*., *supra*, 174 Cal.App.4th at p. 803.)

As it was undisputed that J.M. suffered abuse by Michael, jurisdiction was proper under section 300, subdivision (d).

B. The dispositional order

1. Standard of review

Section 361, subdivision (c) sets the standard for determining whether a dependent child will be removed from parental custody and, in pertinent part, provides as follows:

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[5] Section 300, subdivision (b) provides that "[t]he child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

"A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances . . . : [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." "Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 695.)

"On appeal from a dispositional order removing a child from her parent, we apply the substantial evidence standard of review, keeping in mind that the trial court was required to make its order based on the higher standard of clear and convincing evidence." (*In re Noe F.* (2013) 213 Cal.App.4th 358, 367.)

2. The evidence does not support the juvenile court's dispositional order

Mother contends that there was "no evidence" that J.M. would be in danger if allowed to reside with her given that she was no longer in a relationship with Michael and that she was living in a home for which DCFS had "no safety concerns." We agree.

There is insufficient evidence to demonstrate any "substantial danger" to J.M. to warrant removal. Although mother may have been conflicted regarding her own relationship with Michael, she took immediate and decisive action to protect her son. Indeed, J.M. never saw Michael again after the FBI raid of the house. She ceased to permit all contact between J.M. and Michael and agreed to voluntarily release J.M. to father. Mother continued to visit J.M. at father's house and even got a hotel room near the house so she could be close to J.M. She subsequently ended her relationship with Michael, and moved in with her brother and his family. Mother completed all her counseling and was fully compliant with the case plan. In short, the conditions that led to dependency had been completely eliminated.

Moreover, the court failed to make a finding that there were no reasonable means by which the child could be protected without removal.[6] Nor does the record support such a finding. Courts have recognized that less drastic alternatives to removal may be available in a given case including returning a minor to parental custody under stringent conditions of supervision by DCFS such as unannounced visits. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529–530; *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60–61.) In such cases, "unannounced visits and public health nursing services [are] potential methods of supervising an in-home placement." (*In re Henry V.*, at p. 529.) Accordingly, if the court had doubts about mother, it could have crafted appropriate safeguards without resorting to removal, which was unsupported by the evidence.

Taken together, this evidence does not support the dispositional order, and we therefore reverse it.

DISPOSITION

The order is affirmed as to the jurisdiction, and reversed as to the disposition.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.

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[6] Section 361, subdivision (c)(1), in pertinent part, provides: "A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless . . . there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody."